



INDIANA COURT OF APPEALS  
ORAL ARGUMENT AT A GLANCE  
INDIANA HIGH SCHOOL PRESS ASSOCIATION ANNUAL  
MEETING, FRANKLIN COLLEGE

AVA McSWANE v. BLOOMINGTON HOSPITAL and JEAN M. EELMA, M.D.

**Appeal from:**  
Monroe Circuit Court  
The Honorable Mary Ellen  
Diekhoff, Judge

**Oral Argument:**  
Friday, October 19, 2007  
1:00 — 1:40 p.m.  
20 minutes each side

**MEDICAL MALPRACTICE**

Does a hospital or attending physician have a duty to intervene when domestic violence is suspected and to protect a patient from an attack by the person to whom she is released after treatment?

Was the patient's murder after she was released from the hospital a foreseeable consequence of any negligence on the part of the hospital or the treating physician?

Did a patient who was killed by the person to whom she was released contribute to her own injury by failing to tell the doctor or hospital employees her injuries had been caused by that person and insisting on being discharged into his custody?

**CASE SYNOPSIS**

**Facts and Procedural  
History**

Bloomington Hospital treated Malia Vandeneede for injuries she said she sustained when she fell off a horse onto some debris. In fact, she had been beaten by her former husband with a fireplace poker. Malia never told any hospital personnel she had been injured by her ex-husband. At least two nurses suspected domestic abuse, but the attending physicians were not told of the suspicion. At one point Malia's mother and a friend went to the hospital and told several persons the injuries were inflicted by the ex-husband. Security

was called, and Malia was told she did not have to leave with her ex-husband. Malia insisted on leaving with him and she was discharged into his custody. He killed her on their way home, then killed himself.

Malia's mother, the representative of her estate, sued the Hospital and a doctor there, asserting both had a duty to protect her from the suspected domestic violence. The trial court granted summary judgment for the Hospital on the ground the Hospital and doctor had no such duty, and because Vandeneede was contributorily negligent by misrepresenting the cause of her injury.

*Ava McSwane v. Bloomington Hospital and Jean M. Eelma, M.D.*

## CASE SYNOPSIS

### Parties' Arguments



#### Duty

McSwane argues the Hospital had a duty to protect Malia by separating her from the abuser who brought her to the Hospital, informing her of her options for assistance, and not releasing her to the abuser's custody. This duty, she claims, arose from the Hospital's policies and procedures for dealing with domestic violence.

She argues the doctor who treated Malia

also had a statutory duty to report injuries from sharp and pointed objects. Malia told the doctor she was injured when she fell off a horse, but the injuries were inflicted with a fireplace poker.

#### Contributory Negligence

The trial court found Malia negligently contributed to her own injury, and therefore could not recover from the Hospital or doctor.

## GLOSSARY OF TERMS

**Contributory Negligence:** Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm she has suffered, which falls below the standard to which she is required to conform for her own protection. A plaintiff must exercise that degree of care that an ordinarily reasonable person would exercise in like or similar circumstances. In the medical malpractice context, a plaintiff cannot recover if she is contributorily negligent to even a slight degree.

**Defendant:** The party sued in a civil lawsuit or the party charged with a crime in a criminal prosecution. Here, the defendants are the Hospital and the doctor.

**Duty:** A legal obligation, the breach of which can result in liability. In a lawsuit a plaintiff must claim and prove that there was a duty by defendant to plaintiff. For example, this can be a duty of care in a negligence case.

**Foreseeability:** Reasonable anticipation of the possible results of an action, such as what might happen if one is negligent.

**Medical Malpractice:** An act or continuing conduct of a medical professional that does not meet the standard of professional competence and results in provable damages to the patient. Such an error or omission may be through negligence, ignorance (when the professional should have known), or intentional wrongdoing. Malpractice does not include the exercise of professional judgment even when the results are detrimental to the client or patient.

**Negligence:** Failure to exercise the care toward others that a reasonable or prudent person would do in the circumstances, or taking action which such a reasonable person would not. In making a claim for damages based on an allegation of another's negligence, the injured party (plaintiff) must prove: a) that the party

**Negligence (continued):** alleged to be negligent had a duty to the injured party; b) that the defendant's action (or failure to act) was negligent- not what a reasonably prudent person would have done; c) that the damages were caused by the negligence.

Medical malpractice cases are no different from other kinds of negligence actions regarding what must be proven. The plaintiff must show a duty owed to plaintiff by defendant, a breach of duty by allowing conduct to fall below the applicable standard of care, and injury proximately caused by defendant's breach of duty.

**Plaintiff:** The party who initiates a lawsuit by filing a complaint against the defendant(s) demanding money damages, performance and/or court determination of rights. Here, the plaintiff is Ava McSwane, Malia Vandeneede's mother, who represents Malia's estate.

**Proximate Cause:** The proximate cause of an injury is the negligent act that results in an injury that is the act's natural and probable consequence in light of the circumstances and that should reasonably have been foreseen and anticipated. It is not necessarily the direct or close cause, and there may be more than one proximate cause of an event. The underlying policy is that society assigns legal responsibility only to those whose acts are closely connected to the resulting injuries, such that the imposition of liability is justified.

**Summary Judgment:** A ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon certain facts without trial. A summary judgment is based on a motion by one of the parties that contends all necessary factual issues are settled or so one-sided they need not be tried. The theory behind the summary judgment process is to eliminate the need to try settled factual issues and to decide without trial one or more causes of action in the complaint.

## TODAY'S PANEL OF JUDGES

### **Hon. John G. Baker (Monroe County), Presiding**

- Judge of the Court of Appeals since June 1989
- Chief Judge of the Court since March 2007

**John G. Baker** is originally from Aurora in Dearborn County and lived in Monroe County for 35 years. Since June 1989, he has served as a Judge of the Indiana Court of Appeals representing the First District and has authored more than 3,000 majority opinions. Prior to becoming an appellate court judge, he served as county court and superior court judge for 13½ years in Bloomington, disposing of more than 15,000 cases.

Judge Baker graduated from Culver Military Academy and received his A.B. degree from Indiana University in 1968 in History and his J.D. from the Indiana University School of Law — Bloomington in 1971. He received his LLM in Judicial Process from the University of Virginia in 1995. Before assuming the trial bench, he was a partner in the firm of Baker, Barnhart and Andrews in Bloomington and was a Captain in the U.S. Army Reserves.

Since 1980, Judge Baker has taught as an adjunct professor at Indiana University's School of Public and Environmental Affairs and since 2004 at the School of

Law in Bloomington. In addition, Judge Baker has served on the faculties of the Indiana Judicial College, Indiana Continuing Legal Education Forum, and the National Institute of Trial Advocacy.

His professional associations include the American, Indiana State, Monroe County and Indianapolis Bar Associations. For the latter, he served as Vice-President in 1995. He has been a member of the Indiana Judges Association's Board of Managers continually since 1979 and served as its President from January of 1987 through June of 1989.

Judge Baker has been active in community and civic affairs as well. In addition to his church, YMCA, and other similar organizations, Judge Baker has been active in Boy Scouts of America since his youth and was awarded the rank of Eagle Scout.

Judge Baker was retained on the Court by election in 1992 and 2002. He and his wife have five children and — so far — four grandchildren.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

**Today's oral argument is the 193rd case the Court of Appeals has heard "on the road" since early 2000.**

**Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.**

## TODAY'S PANEL OF JUDGES

### **Hon. Melissa May (Vanderburgh County)**

- Judge of the Court of Appeals since April 1998

**Melissa S. May** was appointed to the Court of Appeals in April of 1998 by Governor Frank O'Bannon and was retained on the Court by election in 2000. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994 to 1999 and has been the

co-chair of ICLEF's Indiana Trial Advocacy College from 2001-2005. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

The 15 judges of the Indiana Court of Appeals issue more than 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.





## TODAY'S PANEL OF JUDGES

### **Hon. Margret G. Robb (Tippecanoe County)**

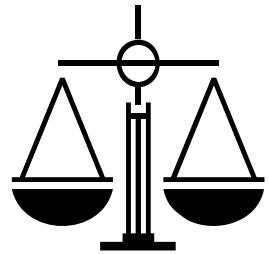
- Judge of the Court of Appeals since July 1998

**Margret G. Robb** was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court, Judge Robb was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges. Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, is married to a professor at Purdue. Their son, a graduate of the United States Naval Academy, is on active duty in the United States Navy.



### **Opinion in this case expected:**

By end of calendar year 2007

*Please check the Court's website to read the opinion.*

For more information, see <http://www.in.gov/judiciary/appeals/>

## ATTORNEYS FOR THE PARTIES

**For Appellant, Ava McSwane:**  
**Steven A. Oliver**  
**Boren, Oliver & Coffey**  
**Martinsville**



**Stephen A. Oliver** was born on March 6, 1951, in Cleveland, Ohio. He earned an A.B. in Psychology from Indiana University, Bloomington in May 1973 and his law degree from the Indiana University School of Law-Indianapolis in 1979. He was admitted to practice in 1979 in the Indiana state and the federal courts.

Mr. Oliver is a former Deputy and Chief Deputy Prosecutor in Morgan County. He is a partner in Boren, Oliver, & Coffey in Martinsville, and a member of the Morgan County, Indianapolis, and Indiana State Bar Associations. He served as President of the Morgan County Bar Association in 1987.

He is a Life Fellow of the Indiana Bar Foundation, a member of the Morgan County Community Corrections Advisory Community Corrections Advisory Board (President from 1992 to 1996), a member since 1984 of the American Trial Lawyers Association and the Indiana Trial Lawyers Association

(ITLA Director since 1992), and a member of the ITLA College of Fellows. From 1988 to 1994, he was an alternate delegate of the Indiana State Bar Association. He has been a member of the Indiana Association of Criminal Defense Lawyers since 1987. He is a frequent lecturer at Indiana Continuing Legal Education Foundation and Indiana Trial Lawyers Association seminars.

Mr. Oliver is a coach, referee, and umpire for youth athletics in Martinsville, working with both the YMCA and Little League. He is a member of the Martinsville Arts Council, Merry Mack Players, and a cantor, choir member, and former chair of the finance committee for St. Martin's Church. He is also active in the Martinsville School Lunch Mentor Program. Mr. Oliver is a member and past officer of the Martinsville Elks Lodge and is active in the Knights of Columbus.

## ATTORNEYS FOR THE PARTIES

### **For Appellee, Bloomington Hospital:**

**Holly Harvey  
Bunger & Robertson  
Bloomington**

**Holly Harvey** graduated from Indiana University in 1994 and received her J.D. from Indiana University School of Law in 1997. She is admitted in Indiana and before the U.S. District Court for the Southern and Northern Districts of Indiana.

Ms. Harvey works primarily in the areas of civil appeals, family law, guardianships and adoptions, insurance defense litigation, and real estate litigation. Her experience is rounded out with family law mediation certification and acting as a continuing legal education (CLE) presenter on a variety of topics.

Ms. Harvey is committed to offering her legal experience to benefit the community. To that end, she devotes a portion of her practice to assisting individuals who cannot otherwise afford private legal services, and also represents Court Appointed Special Advocates in their advocacy for the best interests of children in abuse and neglect cases.

She has served as a member of the Board of Directors and Vice President for Family Service Association/Mental Health Alliance of Monroe County. Ms. Harvey has also been active on the Indiana State Bar Young Lawyers Section Council as District Representative. Above all, Ms. Harvey appreciates the ability to practice in a firm that not only values professionalism and service to the community, but time with family as well.

### **For Appellee, Jean M. Eelma, M.D.:**

**Jeremy Dilts  
Carson Boxberger LLP  
Bloomington**

**Jeremy Dilts** graduated from Indiana University with a B.A. in 1996 and his J.D. in 2000. He is admitted to practice in the State of Indiana and before the U.S. District Court for the Northern and Southern Districts of Indiana.

Mr. Dilts' areas of practice include Civil Litigation; Insurance Defense; Medical Malpractice Defense; Subrogation; and Civil Rights.

Mr. Dilts is a member of the Indiana and American Bar Associations, and the Defense Trial Counsel of Indiana.

Outside of his legal practice, Mr. Dilts serves the community as a member of the Board of Directors of the Autism Society of Indiana, the Chapter Head of the South Central Indiana Chapter of the Autism Society of America, the Treasurer of the Autism Society of Indiana, and the Treasurer of the Indiana Autism Coalition.

